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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. A-440

STUCKEY'S STORES, INC., a Delaware Corporation, individually and as a Representative on behalf of its Franchisees in the State of New Mexico,

Appellant,

v.

FRED O'CHESKY, Chief Highway Administrator, State Highway Department,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEW MEXICO

JURISDICTIONAL STATEMENT

GEORGE GARY DUNCAN
506 Galisteo
Santa Fe, New Mexico 87501
(505) 988-3261

SARAH MICHAEL SINGLETON
PICKARD & SINGLETON
Post Office Box 2423
Santa Fe, New Mexico 87501
(505) 988-4469

Counsel for Appellant

February 1980

Washington, D.C. • THIEL PRESS • (202) 638-4521

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. A-440

STUCKEY'S STORES, INC., a Delaware Corporation, individually and as a Representative on behalf of its Franchisees in the State of New Mexico,

Appellant,

v.

FRED O'CHESKY, Chief Highway Administrator, State Highway Department,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEW MEXICO

JURISDICTIONAL STATEMENT

Stuckey's Stores, Inc., appeals from the decision of the Supreme Court of New Mexico, dated August 6, 1979, holding that the New Mexico Highway Beautification Act did not, as applied in this case, violate the free speech clause of the First Amendment to the United States Constitution.

OPINIONS BELOW

The opinion of the Supreme Court of New Mexico appears in the appendix herein, p. 1a, *infra*. The opinion is also reported at ___ N.M. ___, 600 P.2d 258.

JURISDICTION

The decision of the Supreme Court of New Mexico was filed on August 6, 1979. See p. 1a, *infra*. A timely motion for rehearing was denied on September 11, 1979. See p. 31a, *infra*. Within ninety days of the denial of rehearing, on November 19, 1979, a notice of appeal was filed in the New Mexico Supreme Court. See p. 32a, *infra*. On November 23, 1979, Justice Byron R. White granted an extension of time to docket the appeal to and including February 8, 1980.

Jurisdiction in this Court is invoked under 28 U.S.C. Sec. 1257(2). Cases which are believed to sustain the jurisdiction of this Court are *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Bigelow v. Virginia*, 421 U.S. 809 (1975).

QUESTION PRESENTED

Whether, because the New Mexico Highway Beautification Act prohibits effective advertising by appellant's and its franchisees' roadside businesses in rural areas along interstate and primary highways and is not justified by the rationales offered to sustain it, the Act is an unconstitutional abridgment of appellant's and the traveling public's First Amendment rights.

CONSTITUTIONAL, STATUTORY & REGULATORY PROVISIONS INVOLVED

First Amendment, United States Constitution:

Congress shall make no law . . . abridging the freedom of speech . . . .

New Mexico Statutes Annotated, Section 67-12-4A (1978):

A. No outdoor advertising shall be erected or maintained except:

(1) directional and other official signs and notices authorized or required by law, including, but not limited to, signs and notices pertaining to houses of worship, natural wonders and scenic and historic attractions;

(2) signs, displays and devices advertising the sale or lease of property upon which they are located;

(3) signs, displays and devices advertising activities conducted on the property upon which they are located, provided that the bisection of a parcel of land by a highway right-of-way acquisition shall not in itself be construed as converting the property into more than one parcel;

(4) signs, displays and devices located in areas which are zoned as industrial or commercial under authority of law;

(5) signs, displays and devices located within six hundred sixty feet of the nearest edge of the right-of-way, in unzoned industrial or commercial areas as defined by regulations promulgated by the commission, provided that no area shall be considered to be an unzoned commercial or industrial area unless and until a regulation defining the area

as unzoned commercial or industrial is promulgated by the commission; and

(6) signs lawfully in existence on October 22, 1965, determined by the state highway commission, subject to any necessary federal approval, to be landmark signs of historic or artistic significance worthy of preservation including signs on farm structures or natural surfaces.

Article 1050.00(29) of New Mexico Outdoor Advertising Rules and Regulations:

"Unzoned commercial or industrial area" means any unzoned lands upon which there is located a bona fide commercial or industrial activity operating for at least six (6) continuous months of the year with a valid 12 months business license issued by a city, county or the state, whether or not a permanent structure is located thereon, and the area along the highway extending outward 1,000 feet from and beyond the edge of such commercial or industrial activity and extending perpendicular from the center line to a depth of 660 feet from the nearest edge of the right-of-way line on the same side of the highway as the commercial or industrial activity.

Article 1055.01 of New Mexico Outdoor Advertising Rules and Regulations:

Outside of incorporated villages and cities, no sign structure shall be placed within 500 feet of an interchange, or an intersection at grade, or a safety roadside rest area or any portion of an interstate or primary highway which is a limited access highway. Said 500 feet to be measured along the interstate or limited access primary highway from the beginning or ending of the pavement widening at the exit from or entrance to the main-traveled way.

23 U.S.C. Sec. 131(b):

(b) Federal-aid highway funds apportioned on or after January 1, 1968, to any State which the Secretary determines has not made provision for effective control of the erection and maintenance along the Interstate System and the primary system of outdoor advertising signs, displays, and devices which are within six hundred and sixty feet of the nearest edge of the right-of-way and visible from the main traveled way of the system, and Federal-aid highway funds apportioned on or after January 1, 1975, or after the expiration of the next regular session of the State legislature, whichever is later, to any State which the Secretary determines has not made provision for effective control of the erection and maintenance along the Interstate System and the primary system of those additional outdoor advertising signs, displays, and devices which are more than six hundred and sixty feet off the nearest edge of the right-of-way, located outside of urban areas, visible from the main traveled way of the system, and erected with the purpose of their message being read from such main traveled way, shall be reduced by amounts equal to 10 per centum of the amounts which would otherwise be apportioned to such State under section 104 of this title, until such time as such State shall provide for such effective control. Any amount which is withheld from apportionment to any State hereunder shall be reapportioned to the other States. Whenever he determines it to be in the public interest, the Secretary may suspend, for such periods as he deems necessary, the application of this subsection to a State.

STATEMENT OF THE CASE

Appellant filed an action for declaratory judgment against the appellee in the District Court for the First Judicial District, Santa Fe County, New Mexico. The action was filed on August 9, 1976, the day on which appellee had announced that the State Highway Department would destroy appellant's outdoor advertising signs. The action sought a declaration that the New Mexico Highway Beautification Act was unconstitutional because it violated the First and Fourteenth Amendments to the United States Constitution. A preliminary injunction was issued preventing the destruction of the signs. After a three-day bench trial, the trial court entered judgment against appellant. A timely appeal was taken to the New Mexico Supreme Court. On appeal, the New Mexico Supreme Court reversed the lower court as to the destruction of some signs without compensation because of errors under state law, but as to all other signs the Court affirmed the lower court judgment.

At the trial, evidence was introduced and the court found that appellant's stores sell gasoline, motor vehicle products, food and sundries to motorists using the New Mexico interstate and primary highways. Each of appellant's and its franchisees' stores are in rural areas a substantial distance from the nearest town. Eighty percent of appellant's customers are out-of-state passenger car motorists and fifteen percent are motorists from a part of New Mexico other than the area in which the store is located. These potential patrons are unaware of the locations of appellant's stores unless they are so informed by means of individual outdoor advertisements. The evidence and findings also showed that the traveling public has a strong interest in the availability of outdoor

advertising for roadside businesses offering services such as appellant's.

Appellant's outdoor advertising consists of a series of signs placed on private land along the roadside. The sign most distant from the store is placed on the far side of the town(s) nearest to the store. This sign is to inform the motorist of appellant's location and services so that he may choose the greater convenience of appellant's multiple services and proceed past the town which is shown on road maps and state highway signs sanctioned by the Act. In addition, other signs are placed at distances from the stores which will allow the motorist three to five minutes to decide if he wishes to stop. These distances range from 2.75 to 4.6 miles based on a 55 mile-per-hour speed limit. The evidence was that this time was the minimum necessary for the motorist to decide to stop and to turn off the exit ramp.

The evidence showed that the roadside sign program is appellant's only effective means of advertising and the trial court found that all advertising media other than signs do not afford appellant and its franchisees an adequate or feasible means of informing customers of appellant's locations and services. In addition, the uncontradicted evidence was that the elimination of roadside signs other than on-premise has had a devastating effect on roadside businesses such as appellant's.

Of the six exceptions to absolute prohibition of outdoor advertising under the Act, only three are ostensibly available to appellant. See N.M. Stat. Ann. Sec. 67-12-4A(3)(4)(5) (1978). However, the uncontradicted evidence was that only two places in New Mexico had been zoned commercial or industrial and that none of the signs involved in this suit are located in either location. In addition, the testimony concerning an unzoned commercial or industrial area, wherein an exception in

the Act allows a sign to be placed 1000 feet beyond the immediate premises, showed that there can be no such placement in fact because of another regulation which prohibits placement of signs within 500 feet of the beginning of exit ramps which are themselves located more than 500 feet from the interchange where the stores are situated. The only real exception, the on-premise sign, was demonstrated to be effectively useless as a means of communication because a highway traveler has almost passed the exit ramp before the on-premise sign comes into view.

There was also testimony concerning the logo program which is sanctioned by the Federal government, not state law. This program applies only to interstate highways and involves placing a company's trademark on a sign headed with a generic identification of certain services. For example, one-half mile before an intersection there will be a large sign which says, "GAS". On this sign only the four gasoline stations closest to the interchange may place their logo, such as "Gulf". All others are excluded. Similarly, there are logo signs for motels and food. However, the logo program prohibits price advertising which the evidence demonstrated the public demands, particularly concerning gasoline. Four of the ten Stuckey's stores in New Mexico qualified to be in the logo program though none of the generic signs had been installed as of the trial date. The uncontradicted evidence showed that, based on the Stuckey's experience in Oregon, the logo program was an inadequate substitute for roadside advertising. The logo program is not available to roadside businesses along the primary highways and is especially ineffective for small businesses without a recognizable logo. Moreover, the State did not assert and the trial court did not find that the logo program provides an ample alternative means of advertising.

Throughout the trial, the State declined to introduce any evidence pertaining to the First Amendment claim. Its position was that because the preamble to the Act recited police power purposes, the State was not obliged to factually demonstrate the alleged governmental interests for which the Act was passed. In fact, the trial court found upon the evidence that no signs had been removed in New Mexico to enhance scenic beauty or to protect the public health, safety, welfare, convenience or enjoyment or the public investment in public highways, though it also found without evidentiary support that the regulatory scheme "tends to promote the stated purposes of the Act."

Furthermore, the State made no attempt to show that the alleged governmental interests outweighed the appellant's and the traveling public's demonstrated First Amendment interests and made no attempt to show that the purported alternative means allowed by the Act and the logo program were adequate to satisfy the appellant's and the traveling public's needs.

On appeal, the New Mexico Supreme Court ignored the trial court's findings on the appellant's and traveling public's strong First Amendment interests. The New Mexico Supreme Court ignored the utter lack of evidence pertaining to the alleged governmental interests served by the Act and engaged in pure speculation as to the factual bases upon which it could be upheld. The New Mexico Supreme Court refused to weigh appellant's demonstrated interests against the government's hypothetical interests. The New Mexico Supreme Court ignored the uncontradicted evidence that the only real available advertising means, an on-premise sign, was wholly inadequate to meet appellant's needs.

PRESENTATION OF FEDERAL QUESTION

The complaint in this case challenged the federal constitutionality of the statute. The pre-trial order recited the appellant's claim that the New Mexico Highway Beautification Act denied appellant's freedom of speech under the First Amendment to the United States Constitution as applied to the states by the Fourteenth Amendment.

In the trial brief, appellant argued that the Act violates the First Amendment. The appellant's requested findings of fact and conclusions of law included requested facts which supported its First Amendment claim and a requested conclusion which stated that the Act violated the First Amendment because it so severely limited the only timely, adequate, effective and feasible means by which Stuckey's Stores, Inc., and its franchisees, could communicate to their potential customers information as to the locations of Stuckey's stores and as to the goods, services, conveniences and facilities necessary and convenient to such customers. This requested conclusion was denied.

On appeal the appellant argued that the Act abridged appellant's freedom of speech in violation of the First and Fourteenth Amendments to the United States Constitution. The opinion of the New Mexico Supreme Court addressed this issue and rejected appellant's claim. The motion for rehearing filed by appellant addressed itself to the complete lack of evidence necessary to support the findings which denied appellant's First Amendment claim and to the New Mexico Supreme Court's refusal to apply the proper standards in ruling on appellant's First Amendment claim.

THE QUESTION IS SUBSTANTIAL

Beginning with *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376 (1973), this Court recognized that even commercial speech could be protected by the First Amendment. In *Bigelow v. Virginia*, 421 U.S. 809 (1975), this Court made it clear that commercial speech could not be prohibited without assessing the First Amendment interest at stake and weighing it against the alleged governmental interest served by the regulation. In *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), free speech protection was accorded communication of information which is purely commercial. That the speaker is offering his products or services for economic gain does not disqualify his expression from protection by the First Amendment. *Id.* at 762. Further, the consumer's interest in receiving the information may be as "keen" as his interest in receiving political information. *Id.* at 763.

Of course, the government is not absolutely prevented from regulating speech; however, the power to restrict cannot be exercised in the absence of demonstrated paramount or significant governmental interests. The determination of whether such an interest exists requires a factual basis and a balancing of the individual's interest in free expression against the State's asserted interest. A Court cannot escape making this assessment. *Bigelow, supra* at 826. Moreover, the State must show that its interests outweigh the individual interests. *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 95 (1977).

Specifically with regard to time, place and manner regulations, this Court has set forth the appropriate standards for measuring their constitutionality. In *Virginia Pharmacy Board*, the Court stated:

> We have often approved restrictions of that kind [time, place, and manner] provided that they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in so doing they leave open ample alternative channels for communication of the information.
>
> 425 U.S. at 771.

See also, Grayned v. City of Rockford, 408 U.S. 104, 116-17 (1972). This Court's later decision in *Linmark Associates* makes it clear that the alternatives must be real alternatives and not hypothetical alternatives which will not in fact convey the information to potential customers. 431 U.S. at 93.

Throughout the trial the appellee relied upon the presumption of constitutionality which is normally accorded a state statute under due process and equal protection challenges when no countervailing fundamental interest is at stake. The appellee introduced no evidence which would tend to show that alleged interests of the State actually existed or were enhanced by the regulations or which would show that the magnitude of such interests outweigh the appellant's interests in free expression of commercial ideas. In short, the appellee did no more than to assert that the governmental interests recited in the preamble to the Act were *ipso facto* justifications therefor and were not subject to factual inquiry. The stance assumed below by the State, which was ratified by the New Mexico Supreme Court, is completely contrary to this Court's rulings under the First Amendment.

This Court has always recognized that when a government regulation impinges on free speech the government

carries the burden of justifying the regulation. For example, in *Virginia Pharmacy Board,* it held:

> [T]he justifications Virginia has offered for suppressing the flow of prescription drug price information, far from persuading us that the flow is not protected by the First Amendment, have reinforced our view that it is.
>
> 425 U.S. at 770.

In *Linmark Associates, Inc.,* it further stated: "After *Virginia Pharmacy Bd.* it is clear that commercial speech cannot be banned because of an unsubstantial belief that its impact is 'detrimental.'" 431 U.S. at 92, n.6. Also, in *Carey v. Population Services International,* 431 U.S. 678, 696 (1977), Mr. Justice Brennan reiterated:

> . . . [W]hen a State, as here, burdens the exercise of a fundamental right, its attempt to justify that burden as a rational means for the accomplishment of some significant state policy requires more than a bare assertion, based on a conceded complete absence of supporting evidence, that the burden is connected to such a policy.

Ignoring this fundamental proposition, the appellee asserted and the New Mexico Supreme Court embraced an unjustifiable presumption that the mentioned interests of the State existed. Further, by necessary implication, the Court found them to be of significant stature. Consideration of the specific interests adopted by the New Mexico Supreme Court to uphold the Act, promotion of aesthetics and an economic interest in Federal highway funds, demonstrate the speciousness of each in comparison to the appellant's interests in free expression.

There is no support in the evidence or findings for the Supreme Court's assertion that the Act promotes aesthetics. The Act does not apply to 94.4% of the

roads in New Mexico which the trial court found to be at least as beautiful as the roads covered by the Act. It also found that no outdoor advertising has been eliminated in New Mexico to enhance scenic beauty. Moreover, the Act does nothing to control size, color or design of signs.[1] In *Virginia Pharmacy Board* this Court noted that there were methods by which the State could directly control the quality of pharmacists without prohibiting the advertising of drug prices. Similarly, New Mexico could control the quality and number of roadside signs without prohibiting their effective existence. In *Linmark Associates* the absence of control on all signs or on shape or size of sign rendered the ordinance incapable of promoting aesthetic values. 431 U.S. at 93. The same must be said of the New Mexico Act.

The only justification left for the Act under the New Mexico Supreme Court's opinion is the State's interest in not losing 10% of the federal monies available to it because of failure to comply with the Highway Beautification Act. This Court has often noted that individual interests protected by the Constitution cannot be abridged to save the State money. *Shapiro v. Thompson,* 394 U.S. 618 (1969); *Vlandis v. Kline,* 412 U.S. 441 (1973); *Stanley v. Illinois,* 405 U.S. 645 (1972); *United States Department of Agriculture v. Murry,* 413 U.S. 503 (1973); *Cleveland Board of Education v. LaFleur,* 414 U.S. 632 (1974). *See also Putney v. Township of*

[1] In 1978 the Highway Department did adopt rules and regulations governing the size of signs. Such rules were not in effect until October 19, 1978, and were not an issue in the trial of this cause. There are still no regulations governing design.

Abington, 176 Pa. Super. 463, 108 A.2d 134, 137 (1954). *Cf. Reed v. Reed,* 404 U.S. 71 (1971).

More importantly, there was no contention or showing before the trial or Supreme Court that New Mexico would in fact lose 10% of its federal monies if the Act were declared unconstitutional. The defect in the Act could be cured by simply defining an unzoned industrial or commercial area in a meaningful manner so as not to wipe out appellant's First Amendment interests.

Besides resting its decision on governmental interests which were never claimed nor shown to exist, the New Mexico Supreme Court rested its conclusions as to adequate available alternatives on a presumption not sanctioned by law. The use of such presumption is contrary to this Court's reasoning in *Linmark Associates.* Even though the realtors wishing to sell houses in Willingboro could have advertised in the newspaper and with leaflets, the restriction on yard signs was invalid. The so-called alternatives were more costly, required more work, and would not reach all potential customers. In short, the alternatives were "less effective." 431 U.S. at 93.

Furthermore, the adequate alternatives presumption created by the New Mexico Supreme Court was flatly contradicted by undisputed evidence below. The only evidence regarding these "alternatives" was that the severe restriction of outdoor advertising signs in New Mexico has caused a significant decrease in revenues. The only evidence below was that in other states, where outdoor advertising signs had been replaced by similar alternatives, revenues decreased. The undisputed evidence also showed that those stores not located on an interstate system did not, by definition, qualify for the logo program and that the logo program is ineffective. The evidence below was

that there were only two small places in the state with comprehensive zoning of commercial or industrial areas, and none of the signs involved in the suit were located in those two places. The evidence also showed that the unzoned commercial or industrial area exception was meaningless because another regulation which required signs to be 500 feet beyond exit ramps prevented placement of any signs pursuant to the unzoned area exception. The only alternative left, an on-premise sign, was demonstrated to be inadequate because it does not allow the motorist sufficient time to decide to stop and to exit the highway.

The reliance by the State and by the Supreme Court of New Mexico solely on a presumption of constitutionality to uphold the statute is contrary to this Court's mandates in *Virginia Pharmacy Board, Linmark Associates,* and other First Amendment cases. Moreover, the Supreme Court's cavalier refusal to consider the undisputed evidence and findings of fact demonstrating beyond rational question the violations of appellant's constitutional rights underscores the meaning of the ruling; which is, that under no state of facts will the New Mexico courts afford any free speech protection to roadside businessmen. The Act was held constitutional upon legislative declarations which are contrary to the facts. Upon such fictional underpinnings, the Act cannot stand.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

GEORGE GARY DUNCAN
506 Galisteo
Santa Fe, New Mexico 87501
(505) 988-3261

SARAH MICHAEL SINGLETON
PICKARD & SINGLETON
Post Office Box 2423
Santa Fe, New Mexico 87501
(505) 988-4469

Counsel for Appellant

February 1980

APPENDIX

APPENDIX A

In the
SUPREME COURT OF
THE STATE OF NEW MEXICO

No. 11946

[Filed: Aug. 6, 1979]

STUCKEY'S STORES, INC., a Delaware corporation, Individually and as Representative on behalf of its Franchisees in the State of New Mexico, George Bassett, Robert B. Gottlieb and Shelby C. Phillips, Jr.,

Plaintiffs-Appellants,

v.

FRED O'CHESKEY,
Chief Highway Administrator,
State Highway Department,

Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT
OF SANTA FE COUNTY
(Santiago E. Campos, District Judge)

Charles D. Olmsted
G. Gary Duncan

Olmsted & Cohen
Santa Fe, New Mexico

Attorneys for Appellant

Jeff Bingaman, Attorney General
V. Henry Rothschild
Stephen S. Hamilton

Assistant Attorneys General
State Highway Department
Santa Fe, New Mexico

Attorneys for Appellee

Raymond W. Schowers

Sutin, Thayer & Browne
NMCLU
Albuquerque, New Mexico

Attorneys for Amicus Curiae

SOSA, Chief Justice:

The questions we addressed in this appeal are:

1. Does the New Mexico Highway Beautification Act, §§67-12-1 to 14, N.M.S.A. 1978 (hereinafter referred to as the first[1] and fourteenth amendments[2] to the United States Constitution and Article II, §17[3] of the New Mexico Constitution?

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[1]The first amendment provides in relevant part that:

> Congress shall make no law . . . abridging the freedom of speech, ...

[2]Section 1 of the fourteenth amendment provides in part that:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, ...

[3]Article II, §17 provides in pertinent part that:

> Every person may freely speak, write and publish his sentiments on all subjects, . . . and no law shall be passed to restrain or abridge the liberty of speech . . . .

2. Do the permit provisions of the Act violate the just compensation and due process clauses[4] of the United States and New Mexico Constitution?

3. Are plaintiffs' outdoor advertising signs erected prior to the 1971 amendments to the Act "lawfully erected" under state law and thus entitled to compensation in the event the State condemns them under the Act?

4. Did the State Highway Department waive any right to claim it can destroy all of plaintiffs' lawfully erected signs for which 1976 permit fees had been paid by reason of the Department's acceptance of the fees?

5. Is the State Highway Department equitably estopped from claiming that certain of the plaintiffs' signs may be taken by it without the payment of just compensation?

On August 9, 1976, plaintiff Stuckey's Stores, Inc. (hereinafter refered to as Stuckey's), a Delaware corporation, individually and as a representative if its New Mexico franchisees, filed this action in the District Court

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[4]The fifth amendment to the United States Constitution provides:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Article II, §20 of the New Mexico Constitution provides that:

> Private property shall not be taken or damaged for public use without just compensation.

Article II, §18 of the New Mexico Constitution provides in part that:

> No person shall be deprived of life, liberty or property without due process of law; . . . .

of Santa Fe County seeking a judgment declaring the Act and certain regulations adopted thereunder unconstitutional. Stuckey's also sought a preliminary injunction enjoining defendant from destroying plaintiffs' outdoor advertising signs pursuant to the Act.

On January 11, 1978, after a three-day non-jury trail, the district court entered its judgment against plaintiffs on all issues. The court concluded that the Act is a valid exercise of the State's policy power. It also concluded that enforcement of the Act against plaintiffs does not deny them due process of law or freedom of speech in violation of the United States and New Mexico Constitutions. Plaintiffs appeal.

Plaintiffs Bassett, Gottlieb and Phillips own lands adjacent to the rights-of-way of interstate and primary highways in New Mexico. Outdoor advertising signs relating to plaintiffs' stores are situated on these lands, which are located outside of any zoned industrial or commercial areas. Plaintiffs' businesses consist of furnishing and selling gasoline and other motor products, food, candy, souvenirs and novelties to motorists using the interstate and primary highways along which their businesses are located. Plaintiffs' stores are rurally located and, in most instances, are a substantial distance from the closest town along the same interstate or primary highway at which similar goods or services are available. Approximately 80 percent of plaintiffs' customers are out-of-state passenger car motorists; 15 percent are in-state passenger car motorists from other parts of New Mexico; and 5 percent are local passenger car motorists.

The location of a Stuckey's store along an interstate or primary highway is made known to motorists of such highways by means of outdoor advertising signs located outside, but within 660 feet of, the right-of-way of such

highways on privately owned land pursuant to agreements between the store owner and the owner of the land on which the signs are situated. Advertising signs are spaced at intervals along the highway in both directions from plaintiffs' stores.

The New Mexico Highway Beautification Act was promulgated in 1966 in response to the federal Highway Beautification Act of 1965, *as amended*, 23 U.S.C. §§131, 136, 319 (1966 & Supp. 1979). *See* N.M. Laws 1966, ch. 65, §§1-17. The federal Act specifies that unless a state provides for effective control over outdoor advertising along its interstate and primary highways, federal-aid highway funds will be reduced by amounts equal to 10 percent of the amounts which would otherwise be apportioned to that state. 23 U.S.C. §131(b).

The New Mexico Act conforms with the requirements of the federal Act. It provides that:

> In order to promote public safety, health, welfare, convenience and enjoyment of public travel, to protect the public investment in public highways and to preserve and enhance the scenic beauty of lands bordering public highways, it is the public policy of this state to regulate the erection and maintenance of outdoor advertising . . . in areas adjacent to the interstate and primary systems in accordnace with the Highway Beautification Act [67-12-1 to 67-12-14 NMSA 1978]. The legislature finds that regulation of outdoor advertising . . . is for a highway purpose.

§67-12-3.

The Act only applies to New Mexico's federal-aid interstate and primary highway systems. It does not apply to New Mexico's secondary system or to other state highways. According to State Highway Depart-

ment surveys, approximately 5.6 percent of the total highways and roads in New Mexico are currently designated as interstate and primary highways. The Act prohibits the erection and maintenance, after 1966, of any outdoor advertising within 660 feet of the nearest edge of the right-of-way of an interstate or primary highway, unless it is an on-premise sign, an off right-of-way sign located in areas which are zoned industrial or commercial[5] under authority of law, or in unzoned industrial or commercial areas[6] as defined by regulations promulgated by the State Highway Commission (hereinafter referred to as Commission). §67-12-3.

The Act also provided that the Commission shall establish and collect uniform fees for the issuance of permits for outdoor advertising. §67-12-5(C). Failure

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[5]Article 1050, paragraph 33 of the State Highway Commission's regulations defines "zoned industrial or commercial areas" as

> Those areas which are reserved for business, commerce, trade, manufacturing, or industry, pursuant to a validly promulgated state or local ordinace or regulation.

[6]Article 1050, paragraph 29 of the regulations defines an "unzoned commercial or industrial area" as

> any unzoned lands upon which there is located a bona fide commercial or industrial activity operating for at least six (6) continuous months of the year with a valid 12 months business license issued by a city, county or the state, whether or not a permanent structure is located thereon, and the area along the highway extending outward 1,000 feet from and beyond the edge of such commercial or industrial activity and extending perpendicular from the center line to a depth of 660 feet from the nearest edge of the right-of-way line on the same side of the highway as the commercial or industrial activity.

to timely payment of the permit fee renders the outdoor advertising subject to removal by the Commission without compensation and at the owner's expense. §67-12-5(D).

I.

WHETHER THE ACT ABRIDGES PLAINTIFFS' FREEDOM OF SPEECH

In their first point, plaintiffs claimed that the Act impermissibly infringes upon the first amendment guarantee of freedom of speech made applicable to the states by the fourteenth amendment to the United States Constitution and Article II, §17 of the New Mexico Constitution. Plaintiffs challenge the court's findings which provide, in effect, that:

1. outdoor advertising signs limited to locations on the premises or within 1,000 feet of a Stuckey's store or to commercially or industrially zoned areas along interstate or primary highways in New Mexico afford a reasonable means of informing the motorist of such highways of the presence and location of a Stuckey's store;
2. the Act sets forth a regulatory scheme for outdoor advertising which is reasonable, tends to promote the purposes of the Act, and does not impose an undue burden upon any class of persons; and
3. the regulatory scheme constitutes a reasonable regulation as to time, place and manner of plaintiffs' communications of commercial information through outdoor advertising.

Plaintiffs argue that these findings are not supported by substantial evidence. They contend that the limited advertising allowed by the Act does not afford timely,

adequate or feasible means of informing traveling motorists on interstate and primary highways of the presence of, or the goods and services available at, its stores. Plaintiffs argue that the evidence supports their requested finding that patronage, sales and property values have been substantially reduced by the limited advertising allowed under the Act. Defendant counters that the court's findings are supported by substantial evidence.

We have previously addressed the issue of the Act's constitutionality. In *National Advertising Co. v. State, Etc.*, 91 N.M. 191, 571 P.2d 1194 (1977), sign owners brought suit seeking a declaratory judgment that they should be compensated for the value of their signs which had been removed pursuant to the Act, or alternatively, if their signs were not compensable, that the Act be held unconstitutional as applied to them. This Court specifically held that the Act "is a constitutional enactment by the Legislature." *Id.* at 193, 571 P.2d at 1196. The Court said:

> [I]t was implicit in the Memorandum Opinion that the Act was considered a valid exercise of the state's police power. Property is always held subject to the fair exercise of the state's police power, and reasonable regulations enacted for the benefit of the public health, convenience, safety, or general welfare are not unconstitutional. (Citations omitted.)

Id. at 193, 571 P.2d at 1196.

Plaintiffs argue that the holding in *National Advertising* is inapplicable to the case at bar because the Act was challenged on due process, rather than first amendment, grounds. For the purpose of clarification, we now hold that the Act does not abridge plaintiffs' guarantee of freedom of speech in violation of the United States and New Mexico Constitutions.

Like the federal Highway Beautification Act, the state Act restricts the place and manner of erection of plaintiffs' outdoor advertising structures. It does not regulate the advertising on the basis of its content nor does it completely prevent the dissemination of the same information by alternative means. Thus, we are not faced with a content regulation. In addition, the Act, as applied to plaintiffs, involves restrictions on commercial, rather than political or ideological, speech. The next question, then, is whether plaintiffs' advertising constitutes the type of speech protected by the first and fourteenth amendments to the United States Constitution and Article II, §17 of the New Mexico Constitution. For the reasons set forth below, we hold that it does not.

Two recent United States Supreme Court cases have accorded first amendment protection to commercial speech. In *Bigelow v. Virginia*, 421 U.S. 809 (1975), the Supreme Court reversed a conviction for violation of a Virginia statute that made circulation of any publication encouraging or promoting abortions in Virginia a misdemeanor. The Court rejected the argument that the advertisement involved in that case was unprotected because it was commercial speech. Instead, the Court held that advertising is not stripped of all first amendment protection. The Court stated:

> Advertising, like all public expression, may be subject to reasonable regulation that serves a legitimate public interest. (Citations and footnote omitted.) To the extent that commercial activity is subject to regulation, the relationship of speech to that activity may be one factor, among others, to be considered in weighing the First Amendment interest against the governmental interest alleged.

Id. at 826.

In *Va. Pharmacy Bd. v. Va. Consumer Council* 425 U.S. 748 (1976), consumers of prescription drugs brought suit against the Virginia State Board of Pharmacy challenging the validity of a Virginia statute declaring it unprofessional conduct for a licensed pharmacist to advertise the prices of prescription drugs. The Supreme Court affirmed the district court's decision holding the statute void. The Court held that first amendment protection extends to advertising of a purely commercial nature and that it is not limited to speech of "public interest." Though the Court concluded that commercial speech is protected, it did not hold that such speech could never be regulated. Indeed, the Court states that "[s]ome forms of commercial speech regulation are surely permissible." *Id.* at 770. The Court concluded that a state may not "completely suppress the dissemination of concededly truthful information about entirely lawful activity . . . ." *Id.* at 773.

In *Lindmark Associates, Inc. v. Willingboro,* 431 U.S. 85 (1977), the Supreme Court invalidated as unconstitutional a municipal ordinance which prohibited the posting of real estate "For Sale" and "Sold" signs for the purpose of stemming what the municipality perceived as white flight from a racially integrated community. The Court stated:

> [T]he Willingboro ordinace is not genuinely concerned with the *place* of the speech—front lawns—or the *manner* of the speech—signs. The township has not prohibited all lawn signs—or all lawn signs of a particular size or shape—in order to promote aesthetic values or any other value "unrelated to the suppression of free expression," . . . . (Citation and footnote omitted.) Willingboro has proscribed particular types of signs based on their *content* because it rears their "primary" effect—that they

> will cause those receiving the information to act upon it. That the proscription applies only to one mode of communication, therefore, does not transform this into a "time, place, or manner" case. (Citations omitted and emphasis added.)

Id. at 93-4.

A regulation must satisfy three criteria in order to constitute a legitimate time, place, and manner restriction are:

> (1) the restriction on speech must be "justified without reference to the content of the regulated speech," (2) the restriction must "serve a significant governmental interest." and (3) in so doing, the restriction must "leave open ample alternative channels for communication of the information." (Citations omitted.)

John Donnely & Sons v. Mallar, 453 F. Supp. 1272, 1277 (S.D. Me. 1978). *See also Va. Pharmacy Bd.,* 425 U.S. at 771.

The North Dakota Supreme Court recently addressed the constitutionality of the North Dakota Highway Beautification Act in *Newman Signs, Inc. v. Hjelle,* 268 N.W.2d 741 (N.D. 1978), *appeal dismissed,* 47 U.S.L.W. 3544 (1979). The court concluded that §§24-17-01 through 15, N.D.C.C. 1967 (Repl. 1978), which is almost identical to our Act, did not violate the first amendment guarantee of freedom of speech in that the time, place, and manner restrictions under the North Dakota Act satisifed the criteria set forth in *Va. Pharmacy Bd., supra,* and in *John Donnely & Sons, supra.* The court in *Newman* said:

> [W]e must balance the interests of the State against those of Newman. The State has an interest in providing a safe place for the users of the State high-

ways . . . . The nature of highway driving is such that the eyes of the driver may be diverted, sometimes subconsciously, from the road to the billboard. It is therefore reasonable to assume that the existence of highway billboards could have a detrimental effect on traffic safety.

* * *

The State also has a legitimate interest in protecting, preserving, and enhancing the aesthetic quality of its land . . . .

Id. at 761. The court continued:

The interests of Newman are minimcal in comparison with the public interest involved and the effect that the regulations have on the public and the businesses contracting for advertising space is not so substantial as to outweigh the State's interest is providing a safe and visually pleasing environment.

Id. at 761-2.

We hold that the Act meets the three-pronged test used to determine whether a time, place, and manner restriction is valid. First, the Act's restrictions on plaintiffs' exercise of their freedom of speech is "justified without reference to the content of the regulated speech." None of the Act's stated purposes—promotion of public safety, health, welfare, convenience and enjoyment of public travel, protection of public investment in public highways, and preservation and enhancement of the scenic beauty of lands bordering the public highways—are related to a particular message of such signs. § 67-12-3.

Secondly, the Act's restrictions on plaintiffs' freedom of speech "serve a significant governmental interest." Those interests are matters with which states have been traditionally concerned. In *John Donnelly & Sons, supra,* the federal district court stated:

The emerging majority position, however, and the one to which this Court subscribes, is that the preservation and promotion of aesthetic standards do serve as an adequate basis for comprehensive anti-billboard legislation . . . . (Citations omitted.)

453 F. Supp. at 1278. *See also Village of Belle Terre v. Boraas,* 416 U.S. 1, 5-6 (1974); *Berman v. Parker,* 348 U.S. 26, 33 (1954).

Section 67-12-3 also provides that the Act is designed to "protect the public investment in public highways". State compliance with the terms prescribed by the federal Highway Beautification Act insures that New Mexico receives its share of federal-aid highway funds.

[W]hen legislation based on aesthetic considerations also promotes economic growth, a significant governmental interest is served. (Citations omitted.)

John Donnelly & Sons, 453 F.Supp. at 1279. *See also Moore v. Ward,* 377 S.W.2d 881 (Ky. 1964); *General Outdoor Adv. Co. v. Department of Public Wks.,* 289 Mass. 149, 193 N.E. 799 (1935).

As the third prong of testing a time, place, and manner restriction, we find that the Act "leaves open ample alternative channels for communication of the information." Section 67-12-4 provides six exceptions to the outdoor advertising prohibited by the Act. Three of these exceptions are the placement of signs on premises occupied by plaintiffs' stores, in areas zoned commercial or industrial under the authority of law, and in areas unzoned commercial or industrial as defined by the Commission's regulations.

An additional alternative is provided by the "Logo Program." This program allows the State Highway Department to place signs approximately one-half of a

mile before an interchange at which a commercial establishment, such as plaintiffs', is located, advertising the name of the business and the fact that it provides gas, food, or lodging. The Logo signs are placed within the rights-of-way of the interstate and primary highways in order to adequately inform traveling motorists on these highways of the presence of such businesses. Indeed, four of plaintiffs' ten New Mexico establishments have been approved for placement on such Logo signs. In addition, plaintiffs introduced no evidence that any of their stores, which availed themselves of on-premise or unzoned commercial or industrial area signs after other off-premise signs had been removed, had suffered a great loss of business so as to rebut the presumption that the Act provides adequate means for plaintiffs to exercise their freedom of speech.

Finally, we note that other courts that have considered the first amendment constitutionality of comprehensive anti-billboard legislation, such as is involved in the instant case, have sustained the statute. *See John Donnelly & Sons,* 453 F. Supp. at 1280. For the foregoing reasons, we hold that the Act does not violate plaintiffs' first amendment rights.

II.

WHETHER THE ACT VIOLATED THE JUST COMPENSATION AND DUE PROCESS CLAUSES

In their second point, plaintiffs attack the Act's permit provisions on two constitutional grounds. First, plaintiffs contend that the permit provisions allow for the taking of private property without payment of just compensation in violation of the fifth amendment to the United States Constitution and Article II, §20 of the New Mexico Constitution. Second, they argue that the

provisions abridge their due process rights in violation of the fourteenth amendment to the United States Constitution and Article II, §18 of the New Mexico Constitution. Plaintiffs challenge the court's conclusions which provide, in effect, that:

1. enforcement of the Act against plaintiffs does not take or damage their private property for public use without just compensation and therefore does not violate the United States and New Mexico Constitutions; and
2. enforcement of the Act against plaintiffs does not deprive them of due process of law under the United States and New Mexico Constitutions.

The specific provisions attached by plaintiffs include §§67-12-4(B) and (C), 67-12-5(C) and (D), 67-12-6(A)(1) and (2), and 67-12-6(C) and (F). These provisions were added to the Act in 1971 and became effective on March 15, 1971. *See* N.M. Laws 1971, ch. 140 §§ 2, 3 and 4.

Under §67-12-4(B) and (C), any outdoor advertising which was lawfully in existence on the effective date of the Act and which has continued to so exist may remain in place until it is acquired by the Commission, but only so long as the advertising conforms with standards and bears permits for which the fee has been paid. The Commission may acquire outdoor advertising if it bears the requisite permit and the permit fee required in connection with the advertising's maintenance has been timely paid. §67-12-6(A)(1) and (2). A permit fee is deemed timely paid if it is received by the Commission on or before the first day of the year for which it is being paid. Failure of timely payment renders the outdoor advertising subject or removal by the Commission without any

compensation whatsoever and at the expense of the owner of the outdoor advertising. §67-12-5(D). Finally, no notice is required in connection with permit fees. §67-12-6(C).

The regulation of outdoor advertising along interstate and primary highways is a reasonable and proper exercise of the police power. *See, e.g., National Advertising,* 91 N.M. at 193, 571 P.2d at 1196; *Markham Advertising Company v. State,* 73 Wash.2d 405, 439 P.2d 248, 261 (1968), *appeal dismissed,* 393 U.S. 316 (1960), *rehearing denied,* 393 U.S. 1112 (1969); *In Re Opinion of the Justices,* 103 N.H. 168, 169 A.2d 762, 764 (1964); *General Outdoor Adv. Co.,* 193 N.E. at 816.

In *Newman Signs, Inc., supra,* the North Dakota Supreme Court considered whether that state's Highway Beautification Act's purposes were within the scope of the state's police power. The court said:

> [A] reasonable restriction of the use of property pursuant to a State's police power does not constitute a taking of private property for public use requiring payment of just compensation so long as the regulation is reasonably related to a proper purpose and does not unreasonably deprive the property owner of all or substantially all use of his property. (Citations omitted.)

268 N.W.2d at 755-6. The court concluded that the North Dakota Act was reasonably related to legitimate governmental purposes and that it did not deprive plaintiff of all or substantially all of the beneficial use of its property.

We note that the purposes of North Dakota's Act are similar to those provided in §67-12-3 of the Act. Those purposes include "promoting the safety and convenience of those traveling on the highways; protecting the public

investment in the State highway system; and promoting the enjoyment and recreational value of the State highways." *Id.* at 757. *See also Markham Advertising Company,* 439 P.2d at 260.

We hold that the Act's restrictions are "reasonably related to proper purposes." Furthermore, the restrictions do "not unreasonably deprive the property owner of all or substantially all use of his property." The owner of the land upon which a sign is situated merely loses the right to use or lease certain areas of his property for the purpose of highway billboards. The sign owner merely loses the right to place the billborad on certain sites. In addition, the State Highway Department only orders the removal of those signs which are illegal. Thus, a sign owner only loses the use of a sign in a particular location if he either erects the sign after 1966 in contravention of the Act or if he fails to keep his permit current. *Cf. Sullivan Outdoor Advertising v. Dept. of Transp.,* 420 F. Supp. 815 (N.D. Ill. 1976). In *Sullivan Outdoor Advertising,* the federal district court addressed the constitutionality of the Illinois Highway Advertising Control Act of 1971, Ill.Rev.Stat. ch. 121, §501 *et seq.* (1973). Like our Act, the Illinois statute provides that certain classes of signs, which are declared unlawful, are subject to removal without just compensation. The court determined that plaintiff's contention, that the provision allowing for the taking of signs without compensation conflicted with the just compensation clause of the federal Act, was insubstantial and devoid of merit. *Id.* at 819.

We conclude that the Act is a valid exercise of the police power. We, therefore, affirm the court's conclusion that enforcement of the Act against plaintiffs does not violate the just compensation clauses of the United States and New Mexico Constitutions.

Plaintiffs next argue that even if the Act is upheld as a valid exercise of the state's police power, the Act's permit provisions are unreasonable, arbitrary and capricious and, therefore, violate the due process clauses of the United States and New Mexico Constitutions. Plaintiffs' argument focuses on §67-12-6(C). Even though §67-12-6(C) does not require the State Highway Department to give notice in connection with permit fees, we note that the Department's standard procedure for removal of any illegal sign is the issuance of a thirty-day notice to the sign owner. Section 1063.00 of the Commission's regulations pertains to the removal of noncompensable signs. It provides:

> Permit Violations: Any outdoor advertising notice which has been erected or maintained in violation of the permit requirements of the Beautification Act or Regulations, which has been erected or maintained without timely payment of all permit fees required by the Beautification Act or Regulations, is subject to removal by the Department without any compensation whatsoever and at the expense of the owner of the outdoor advertising device. *Such removal will be preceded by notice to the owner of the outdoor advertising device,* if known, that the device must be removed within 30 days or will be subject to removal by the Department at the owner's expense. If the outdoor advertising device is not removed within the 30 days, the Department may thereafter remove the device at the expense of the owner of the device without any compensation whatsoever. (Emphasis added.)

This procedure was followed in regard to all of the signs involved in this lawsuit. We find that this procedure complies with the requirements of procedural due process.

In *John Donnelly & Sons, supra,* plaintiffs challenged the constitutional validity of the Maine Traveler Information Services Act, 23 M.R.S.A. §§1901-1925 (1978). Plaintiffs claimed that the Maine statute constituted an invalid exercise of the police power in contravention of the fourteenth amendment due process clause. The court determined that plaintiffs' claim was without merit. 453 F.Supp. at 1280. In *Sullivan Outdoor Advertising, supra,* the federal district court concluded that plaintiffs' claim was without merit. 453 F.Supp. at 1280. In *Sullivan Outdoor Advertising, supra,* the federal district court concluded that plaintiff's substantive due process claim was insubstantial. 420 F. Supp. at 820.

Plaintiffs in *Markham Advertising Company, supra,* contended that Washington's Highway Control Act deprived them of due process because it authorized the taking of their property without compensation. The Washington Supreme Court said:

> When a court determines, as we have in this case, that the police power has been properly invoked, there is no basis for this contention. (Citations omitted.) . . . Plaintiffs' due process rights have been secured to them once it has been determined that the exercise of the police [*sic*] power is in harmony with constitutional requirements.

439 P.2d at 261.

We adopt the rationale followed by the courts in *John Donnelly & Sons, supra, Sullivan Outdoor Advertising, supra, and Markham Advertising Company, supra.* Plaintiffs have failed to show that the Act is not in furtherance of legitimate legislative objectives or that the means set out by the Act and by the Commission's regulations are not reasonably related to the Act's objectives. We conclude that the Act's permit provisions are not arbi-

trary or capricious and that they are reasonably necessary in order for the State High Department to ensure compliance with the Act's provisions. The court's conclusion that enforcement of the Act against plaintiffs does not violate the due process clauses of the United States and New Mexico Constitutions is hereby upheld.

III.

WHETHER PLAINTIFFS' SIGNS ERECTED PRIOR TO THE 1971 AMENDMENTS TO THE ACT WERE "LAWFULLY ERECTED" UNDER THE ACT

In their third point, plaintiffs assert that their signs, which were erected after the effective date of the Act, but prior to the 1971 Amendments to the Act, were "lawfully erected" under the Act and, therefore, that they are entitled to just compensation in the event that the State condemns them.

Section 67-12-6(A)(4) provides that the Commission may acquire all outdoor advertising which "was lawfully in existence on the effective date of the . . . act . . . and has continued to so exist, or was lawfully erected subsequent to said effective date." Plaintiffs contend that the Legislature intended that all outdoor advertising erected subsequent to the 1966 Act and prior to the 1971 Amendments was "lawfully erected" under the statute. Defendant counters that plaintiffs' signs which, were erected subsequent to the 1966 Act and which are not within one of the exceptions set forth in §67-12-3, were not lawfully erected and, therefore, plaintiffs are not entitled to just compensation for the removal of their signs.

The district court found that plaintiffs' signs, which were erected subsequent to the effective date of the Act, have at all times since the date of their erection failed to

quality under any of the exceptions set forth in §67-12-4(A). Permit applications and permit fees were not tendered as required by the Act. The court concluded that these signs are public nuisances because they failed to qualify under §67-12-4(A) and because they failed to comply with the Act's permit provisions.

Section 67-12-4(A) establishes six exceptions to the Act's prohibition against outdoor advertising. These six exceptions are the only signs that may be lawfully erected after 1966. We conclude that those devices erected after the effective date of the Act and prior to the 1971 Amendments which do not qualify under §67-12-3(A)(1) through (4) were erected in violation of the Act. Therefore, we hold that plaintiffs' signs erected after the Act's effective date and prior to the 1971 Amendments were not lawfully erected.

IV.

WHETHER THE STATE HIGHWAY DEPARTMENT WAIVED THE RIGHT TO CLAIM IT CAN DESTROY PLAINTIFFS' SIGNS

In their fourth point, plaintiffs argue that the trial court erred in refusing to rule that the State Highway Department had waived any right to claim it could destroy all of plaintiffs' signs which had paid their permit fees by reason of the Department's acceptance of late fees. The fees for the years 1968, 1969, 1970 and 1971 for the signs at issue were paid on November 18, 1971. Plaintiffs claim that because the Department accepted the fees, it waived its right to claim that the permit fees were untimely paid and, therfore, that it could acquire the signs without paying just compensation. Defendant counters that there was no waiver because at State Highway Department employee cannot waive the provisions

of the Act and because there was no intent to waive the provisions.

Section 67-12-5(D) provides in relevant part that:

> Any permit fee payable for the years 1966 through 1971 inclusive shall be deemed timely paid if, but only if, the fee is received by the commission prior to July 1, 1971 . . . .

The fees for the signs at issue were not paid prior to July 1, 1971; they were paid on November 18, 1971. There is no dispute that the fees were not timely paid. The question is whether the Department waived its right to claim it could destroy plaintiffs' signs due to untimely payment once it accepted the fees.

A waiver has been defined as "the intentional relinquishment or abandonment of a known right, . . . the act of waiver may be evidenced by conduct as well as by express words. (Citations omitted.)" *Cooper v. Albuquerque City Commission,* 85 N.M. 786, 790, 518 P.2d 275, 279 (1974). *See also* 28 Am. Jr. 2d *Estoppel and Waiver* §154 (1966). To constitute a waiver, the right claimed to have been waived must have been in existence at the time of the alleged waiver. 28 Am. Jr. 2d *Estoppel and Waiver* §157 (1966).

In the case before us, the State Highway Department knew that the fees in question were not timely paid when it accepted the fees. Nonetheless the Department issued the permits. Under these circumstances, we hold that the Department cannot claim the benefit of §67-12-5(D) in an effort to acquire plaintiffs' signs. We are of the opinion that the Department's acceptance of the late permit applications and permit fees and the issuance of the permits constituted a waiver by the Department of §67-12-5(D). The court's conclusion that

acceptance of the late applications and fees did not constitute a waiver is reversed.

V.

WHETHER THE STATE HIGHWAY DEPARTMENT IS EQUITABLY ESTOPPED

In their final point, plaintiffs argue that the trial court erred in ruling that the State Highway Department is not equitably estopped from claiming that certain of plaintiffs' signs may be taken by it without just compensation. Defendant counters that the Department is not estopped from ordering the removal of these signs.

The nine signs at issue were erected prior to the effective date of the Act. The signs became subject to a State Highway Department right-of-way acquisition in 1967; however, the signs were not condemned by the Department. On November 2, 1967, the Department granted plaintiffs McClue permission to relocate the signs without affecting the owner's right to compensation in the event that the signs were subsequently acquired by the Commission. The Department indicated to the sign owner before the erection of the signs at the new locations that they would be considered on-premise signs for the present. At trial defendant aruged that the signs to be removed without compensation since their placement occurred after the effective date of the Act. Permit fees had been paid for the signs each year through 1968.

In *State ex rel. State Highway Department v. Yurcic,* 85 N.M. 220, 223, 511 P.2d 546, 549 (1973), the Court quoted the following language which is set forth in *Westerman v. City of Carlsbad,* 55 N.M. 550, 555-6, 237 P.2d 356, 359 (1951):

> The essential elements of an equitable estoppel as related to the party estopped are: (1) Conduct

> which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) intention, or at least expectation, that such conduct all be acted upon by the other party; (3) knowledge, actual or constructive, of the real facts. As related to the party claiming the estoppel, they are: (a) Lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party estopped; and (3) action based thereon of such a character as to change his position prejudicially.

In *State ex. rel. State Highway Dept. Etc. v. Shaw,* 90 N.M. 485, 565 P.2d 655 (1977), the Court agreed with the defendants' assertion that equitable estoppel procluded the State from denying their recovery of the enhanced value of their land in that condemnation proceeding. This Court rejected the trial court's reasoning that estoppel did not apply because there was not false representation or concealment on the part of the State Highway Department. We said:

> The trial court failed to apply that part of the Yurcic test which triggers an estoppel claim when the "conduct . . . is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert . . . ." It is clear that the Department is now adopted a position that is contrary to its representations to the defendant in 1973. *Representations that are contrary to the essential facts to be relied upon, even though made innocently or by mistake, will support the application of the estoppel doctrine.* (Emphasis added.)

Id. at 488, 565 P.2d at 658.

In the case at bar, the district court found that plaintiffs failed to show that they had relied on the Department's representation that the relocation of the signs would not affect the owner's right to compensation. It is our opinion that this finding is in error. By granting permission to plaintiffs to relocate the signs, the Department's conduct conveyed to plaintiffs that the right to compensation would not be affected. Plaintiffs acted upon that permission as is evidenced by the fact that the signs were moved to new locations soon after the permission was granted. The finding of the district court in this regard is conversed. We hold that the Department is equitably estopped from claiming that plaintiffs McClures' signs were "newly erected" and are subject to removal without just compensation.

The decision of the district court is thus affirmed in part and reversed in part. The cause is remanded to the district court for further proceedings not inconsistent with this opinion.

IT IS SO ORDERED.

/s/ Dan Sosa, Jr.
Chief Justice

WE CONCUR:

/s/ H. Vern Payne
Justice

/s/ William R. Federici
Justice

APPENDIX B

IN THE
SUPREME COURT OF THE STATE OF
NEW MEXICO

No. 11946

[Filed: Aug. 16, 1979]

STUCKEY'S STORES, INC., a Delaware corporation, Individually and as a Representative on behalf of its Franchisees in the State of New Mexico, George Bassett, Robert B. Gottlieb and Shelby C. Phillips, Jr.,

Plaintiffs-Appellants,

v.

FRED O'CHESKEY,
Chief Highway Administrator/State
Highway Engineer of the New Mexico
State Highway Department,

Defendant-Appellee.

MOTION FOR REHEARING

Pursuant to Rule 19, Rules of Appellate Procedure, Plaintiffs-Appellants move the Court for a rehearing of the Freedom of Speech claim on the following grounds:

1. The decision overlooks the plethora of New Mexico case-law, some of which is cited at page 1 of the Brief-in-Chief, which holds that a judgment dependent upon findings of fact not supported by substantial evidence, which are property attacked or challenged on appeal, must be reversed. Appellants demonstrated in their brief (pp. 2-7), that the trial court's Findings 11, 15, and 17, upon which the Free Speech part of the Judgment is based, are not supported by one word of evidence in the record. All of the pertinent evidence is to the contrary. The State did not cite any evidence in its brief which would support the Findings and this Court, through properly characterizing the issue as involving a substantial evidence question, did not even address it in the body of the decision. If it had forthrightly done so, the Judgment would have to be reversed.

2. The decision overlooks or misapprehends the United States Supreme Court decisions in the First Amendment area that unanimously place upon the *government* the burden of *factually* demonstrating (1) "paramount" or "significant" governmental interests sufficient to overcome the free speech interests at stake and (2) that the restrictions on speech leave open "ample alternative channels of communication". See *Brief-in-Chief,* pp. 17-18 and *Brief Amicus Curiae,* pp. 6-8.

In this case, the State overtly refused to accept its burden and maintained that a strong presumption of constitutionality and the legislative declaration of purpose set forth in §67-12-3 N.M.S.A. 1978 were sufficient in and of themselves to preclude an attack on the Act on Free Speech grounds. See *Answer Brief,* pp. 1-3 and Tr. 242-243, 343-348, 373-375, 465-469, and 499-500.

In its decision, this court has embraced the State's position in two ways. First, it ignores the sum and substance of the evidence and the trial court's Findings of Fact which demonstrate that no significant governmental interests are served by the Act, particularly safety and esthetics (see Findings 5, 13 and 14, which were not challenged and are binding upon this court), and holds as a matter of law, not fact, that an esthetic purpose is

served as well as that it is "significant" in the constitutional sense.

Second, the decision creates an irrebutable legal conclusion which judicially insulates the Act from any constitutional attack whatsoever. That is, the decision first rules that there is a presumption that the Act leaves open ample alternative channels of communication and thus places the burden of proof upon the Appellants, not the government. Then, even though the Appellants did in fact demonstrate without dispute that no significant governmental interests are served by the Act (see Findings 5, 13, and 14 and *Brief Amicus Curiae,* pp. 9-16), and that the Act leaves no ample alternative channels of communication (See Finding 10, *Brief-in-Chief,* pp. 1-3, *Brief Amicus Curiae,* pp. 1-3, 18-20) the court overlooks and disregards this undisputed evidence and finds upon imaginative fiction that Appellants failed to carry their burden.

3. The decision finds a "significant" governmental interest in protecting the public interest in public highways by insuring that New Mexico does not lose ten percent of its Federal Aid Highway Funds. This statement begs the unstated question which is whether New Mexico would in fact suffer a ten percent reduction should this court declare the Act unconstitutional. It would not. What it would do is require the State Highway Department and the bureaucrats in the Department of Transportation to tailor an "Agreement" in compliance with the First Amendment, i.e., to define "unzoned industrial or commercial area" more broadly than it is at present under guidelines set down by this court, based upon the evidence introduced at trial. Then the Legislature would pass a new Act to satisfy the Federal agreement. Appellants have never maintained that there

should be no Highway Beautification Act, only that the present Act impremissibly infringes upon their First Amendment rights.

4. The Decision overlooks the obligation placed upon it by the United States Supreme Court's decision in *Bigelow v. Virginia,* 421 U.S. 809 (1975) by failing to properly assess the First Amendment interests at stake and weighing them against the public interest allegedly served by the regulation. The First Amendment interest did not even merit a passing word in the decision though establishing them constituted a major part of Appellants' case. (See Findings 4, 5, 6 and 7, Tr. 60-61, *Brief-in-Chief,* pp. 6-7, *Brief Amicus Curiae,* p. 8-9.) It is clear from the decison that no consideration whatever was given to Appellants, consumer, or the public interest in the free flow of information. This was legal error.

5. There are factual errors. First, at page 11 of the decision, the court states that ". . . plaintiffs introduced no evidence that any of their stores, which availed themselves of on premise . . . signs after other off premise signs had been removed, had suffered a great loss of business . . ." Plaintiffs could not have introduced that type of evidence because none of their off-premise signs had been removed prior to trial. They were protected by a preliminary injunction. Because of that fact, however, Plaintiffs did introduce a mound of evidence demonstrating the literal financial disaster which other similar roadside businesses have suffered when their off-premise signs were destroyed. See *Brief-in-Chief,* pp. 6-7.

Second, at page 11 of the decision, it is stated that the "Logo signs are placed within the rights-of-way of the interstate and primary highways in order to adequately

inform traveling motorists on these highways of the presence of such businesses." This is untrue. The Logo program, such as it is, applies only to the interstate, not the primary highways. Tr. 244, 286. Moreover, the undisputed evidence demonstrated the *in*adequacy of the logo program as an ample alternative means of advertising. See *Brief-in-Chief,* pp. 5-6.

For the foregoing reasons, the court is requested to grant this motion for Rehearing and to thereafter reverse the free speech portion of its decision.

/s/ G. Gary Duncan
One of the attorneys for
Plaintiff-Appellants
Suite K, Kruger Building
227 E. Palace Avenue
Santa Fe, New Mexico 87501
988-5618

I certify that I mailed a copy of the Motion for Rehearing to Stephen Hamilton, P.O. Box 1149, Santa Fe, New Mexico and Raymond Schowers, P.O. Box 1945, Albuquerque, New Mexico on the 16th day of August, 1979.

/s/ G. Gary Duncan

APPENDIX C

IN THE
SUPREME COURT OF THE STATE OF
NEW MEXICO
SANTA FE COUNTY

Tuesday, September 11, 1979

No. 11,946

STUCKEY'S STORES, INC., a Delaware corporation, Individually and as Representative on behalf of its Franchisees in the State of New Mexico, George Bassett, Robert B. Gottlieb and Shelby C. Phillips, Jr.,

Plaintiff-Appellant,

v.

FRED O'CHESKY,
Chief Highway Administrator,
State Highway Department,

Defendant-Appellee.

This matter coming on for consideration by the Court upon Motion of Appellant for Rehearing and Motion of Appellee for rehearing, the Court having considered said motions and being sufficiently advised in the premises;

NOW, THEREFORE, IT IS ORDERED that Motion of Appellant for Rehearing and Motion of Appellee for Rehearing be and the same are hereby denied.

APPENDIX D

IN THE
SUPREME COURT OF THE STATE OF
NEW MEXICO

No. 11946

[Filed: Nov. 19, 1979]

STUCKEY'S STORES, INC., a Delaware corporation, Individually and as Representative on behalf of its Franchisees in the State of New Mexico, George Bassett, Robert B. Gottlieb and Shelby C. Phillips, Jr.,

Plaintiffs-Appellants,

v.

FRED O'CHESKEY,
Chief Highway Administrator,
State Highway Department,

Defendant-Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Stuckey's Stores, Inc., the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of New Mexico, entered in this action on August 6, 1979, in which a timely motion for rehearing was denied on September 11, 1979.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Respectfully submitted,

G. Gary Duncan
506 Galisteo
Santa Fe, New Mexico 87501
(505) 982-8987

/s/ Sarah M. Singleton
Pickard & Singleton
Post Office Box 2423
Santa Fe, New Mexico 87501
(505) 988-4469

Attorneys for Appellant.

CERTIFICATE OF SERVICE

I, Sarah M. Singleton, a member of the Bar of the Supreme Court of the United States, certify that a copy of the above notice of appeal was served on the Office of the Attorney General of the State of New Mexico, Post Office Drawer 1508, Santa Fe, New Mexico 87501, and on the Legal Division of the State Highway Department, Post Office Box 1149, Santa Fe, New Mexico 87503, by posting the same, first-class, prepaid postage in the mails of the United States this 19th day of November, 1979.

/s/ Sarah M. Singleton